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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 104

OAK WORSTED MILLS, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 7, 1930

CERTIORARI GRANTED JUNE 2, 1930

(35,011)

(35,011)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 880

OAK WORSTED MILLS, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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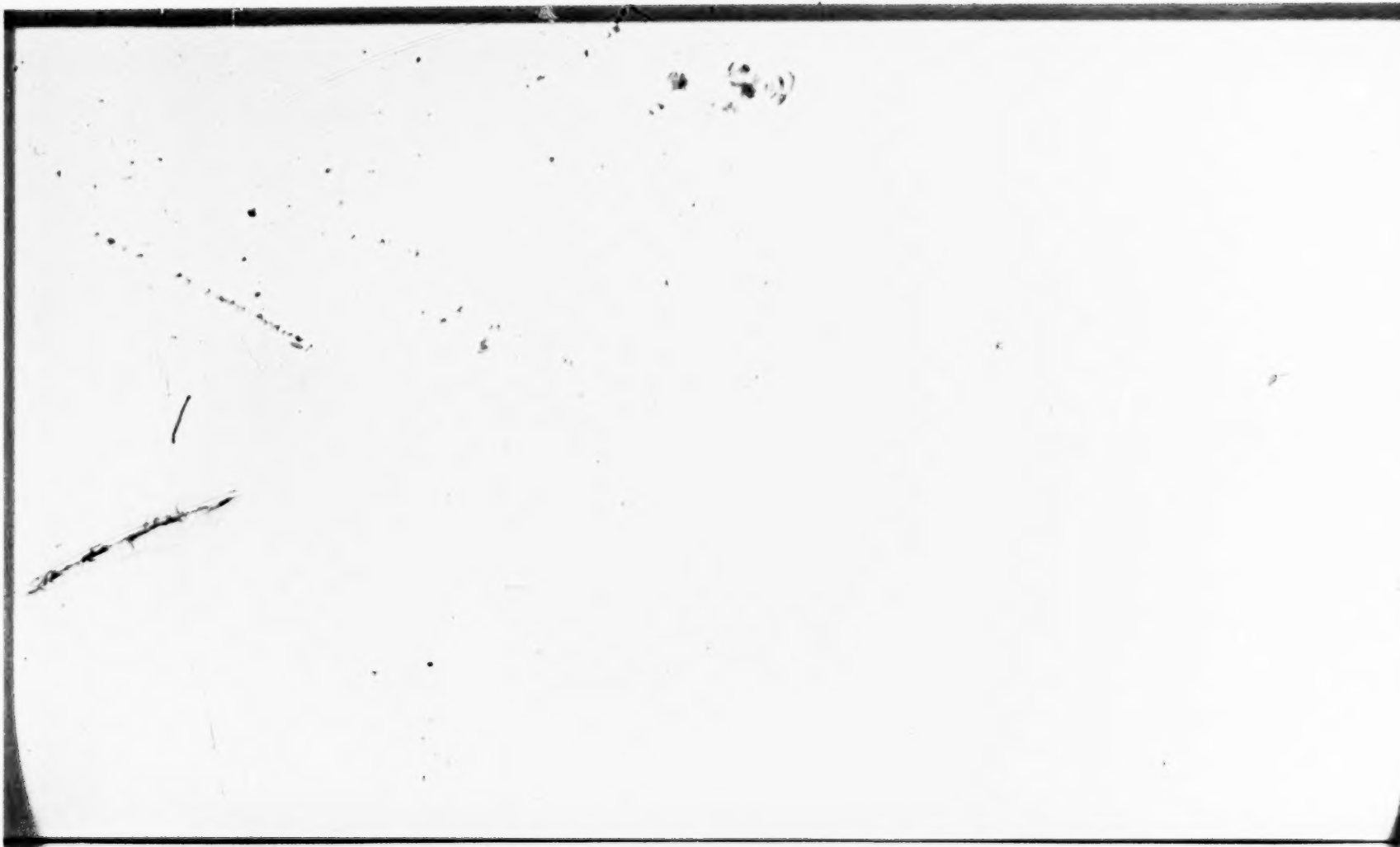

[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 880

OAK WORSTED MILLS, a Body Corporate, Petitioner,

v.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Theodore B. Benson, on behalf of Oak Worsted Mills a body corporate, prays that a writ of certiorari be issued to review the judgment of the Court of Claims entered in the above entitled cause on February 17, 1930.

Statement

The petitioner, a corporation, on June 16, 1919, duly filed its return of income and profits taxes for the calendar year 1918 and reported therein a tax of $91,994.37 which was paid in full during the year 1919. The petitioner filed its petition in the Court of Claims on April 4, 1928, and the respondent filed a general traverse.

[fol. 2] On June 27, 1921, the petitioner filed a claim for refund, the basis of which claim was an application for assessment of profits tax under the provisions of Sections 327 and 328 of the Revenue Act of 1918. The Commissioner of Internal Revenue determined the tax under the provisions of Sections 327 and 328 and found an overassessment in the amount of $26,487.97, which was made the subject of a certificate of overassessment bearing date of June 21, 1922, and which said sum was refunded to the petitioner.

On or prior to March 26, 1924, the Commissioner without the petitioner's knowledge or consent made a re-examination of the petitioner's application and on that date notified the petitioner that the previous determination of the tax was erroneous and that the total tax liability under Sections 327 and 328 was $79,262.44 and that an additional tax

was due in the amount of $13,756.02 and shortly thereafter assessed the said amount. On April 12, 1924, and on notice and demand for payment the petitioner filed a claim in abatement in the amount of $13,756.02, on the grounds that the matter had become res judicata and was barred by the statute of limitations and by the provisions of revenue acts then in force.

On February 11, 1925, the Commissioner made a further redetermination of the tax and notified the petitioner that the comparatives used in his previous re-determination were erroneous and that the petitioner had been overassessed $6,345.76 and that the claim in abatement would be allowed for the amount and rejected for $7,410.26.

[fol. 3] On June 1, 1925, the collector made demand for payment of the said sum of $7,410.26. Thereupon the petitioner, in the District Court of the United States for the Eastern District of Pennsylvania, sought to enjoin the collector and the injunction was denied July 1, 1925, 6 F. (2d) 662. On August 27, 1925, the Collector of Internal Revenue again made demand for payment of the said sum of $7,410.26, which together with interest in the amount of $592.82 was paid September 10, 1925.

Statutes Involved

The statutes involved are Sections 327 and 328 of the Revenue Act of 1918 (40 Stat. 1057); Section 250 (d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266); Sections 607 and 611 of the Revenue Act of 1928 (45 Stat. 791, 874, 875); and Section 3226 of the Revised Statutes, as amended (44 Stat. 116).

Sections 327 and 328 of the Revenue Act of 1918 (40 Stat. 1057) with reference to the computation of the excess profits tax and as applicable here read in part as follows:

"Sec. 327. That in the following cases the tax shall be determined as provided in section 328; * * *

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax

computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. * * *

[fol. 4] "Sec. 328. (a) * * * In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary. * * *"

Section 250(d) of the Revenue Act of 1921 (42 Stat. 277, 265, 266) as applicable here reads in part as follows:

"* * * If upon examination of a return made under * * * the Revenue Act of 1918, or * * * a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not less than thirty days after such notice is sent by registered mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed and paid, * * * within ten days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained: * * *"

Sections 607 and 611 of the Revenue Act of 1928 (45 Stat. 791, 874, 875) read as follows:

"Sec. 607. Effect of Expiration of Period of Limitations Against United States

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or

after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

[fol. 5] "Sec. 611. Collections Stayed by Claim in Abatement

"If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Section 3226 of the Revised Statutes, as amended by the Revenue Act of 1926 and not changed by the Revenue Act of 1928, (44 Stat. 116), reads as follows:

"No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

A

Questions Presented

1. Whether the principle of law, that where an administrative officer or head of a department invested by an Act [fol. 6] of Congress with exclusive jurisdiction to determine a matter involving purely administrative judgment and discretion has once reached a conclusion which is communicated agreeable to the requirements of the law his decision is final and conclusive and not subject to reexamination by the department, applies to the Commissioner of Internal Revenue?

2. Had the Commissioner of Internal Revenue authority, under Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266), to make the re-assessment, as an additional assessment to correct an alleged excessive overassessment where the entire tax imposed by statute had theretofore been assessed and paid in full?

3. Do the provisions of Section 611 of the Revenue Act of 1928 (C. 852, 45 Stat. 791, 876) apply to this case?

4. Had petitioner, on April 4, 1928, under Section 250(d) of the Revenue Act of 1921, acquired a vested right of action, a property right under the Constitution?

5. Does Section 611 of the Revenue Act of 1928, enacted May 29, 1928, deprive the Court of Claims of jurisdiction of petitioner's suit and petitioner of its remedy, under Section 3226 of the Revised Statutes, as amended?

B

Reasons for the Allowance of the Writ

1. The holding of the court below that the determination of a profits tax under Sections 327 and 328 of the Revenue Act of 1918 by the Commissioner of Internal Revenue is not final, conflicts with the decision of this Court in the case of Williamsport Wire Rope Co. v. U. S. 277, U. S. 551, 48 S. Ct. 587.

[fol. 7] 2. The holding of the court below that the Commissioner may review and reverse his previous exercise of

discretion in the selection of comparatives for the computation of the tax under Section 328 conflicts with the decisions of this Court in the cases of Ex parte Randolph, 2 Brock (U. S.) 447; U. S. v. Bank of Metropolis, 15 Pet. 245, 40 U. S. 384; West v. Standard Oil Company, 278 U. S. 200, 49 S. Ct. 139 and U. S. v. Arredondo, 6 Pet. 729, 31 U. S. 691, and with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of Woodworth v. Kales, 26 F. (2d) 178.

3. The holding of the court below that the principle, that an administrative officers' determination is final, does not apply to the Commissioner of Internal Revenue in this case, conflicts with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of Park Falls Lumber Co. v. Burlingame, 1 F. (2d) 855, certiorari denied 266 U. S. 626, 45 S. Ct. 125.

4. The holding of the court below that the Commissioner of Internal Revenue has authority to re-assess as an internal revenue tax a tax previously assessed and collected, conflicts with the decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of Talcott v. U. S. 23 F. (2d) 897, certiorari denied 277 U. S. 604; and Kelly v. U. S. 30 F. (2d) 193.

5. The holding of the court below that the Commissioner had authority to make the re-assessment and re-collection of an overpayment of a tax legally refunded, amounts to usurpation by the executive department of the functions of the judicial department and the taking of petitioner's property, without due process of law, in violaion of Article III, Section I and Amendment V, respectively, of the Constitution.

[fol. 8] 6. The holding of the court below that the Commissioner may make such re-assessment, in the absence of authority conferred by Congress, conflicts with the decision of this Court in the case of Meriwether v. Garrett, 102 U. S. 501, 26 L. Ed. 197.

7. The foregoing questions are of public importance for the reason that other cases involving the same questions are now pending in the courts and still others are under consideration by the Treasury Department. This is recognized

by the court below. In its opinion the court stated that there are other cases on the docket involving the same questions.

8. The questions involved in this case with reference to Section 611 of the Revenue Act of 1928 are substantially the same as those involved in the case of Graham and Foster Co-partners etc., petitioners, v. Goodcell, Collector, No. 589, October 1929 Term, in which case this Court granted a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit on March 3, 1930. The decision of the circuit court of appeals is reported in 35 F. (2d) 586.

Wherefore it is respectfully submitted that this petition should be granted.

Oak Worsted Mills, by Theodore B. Benson, Theodore B. Benson, Counsel for Petitioner.

[fol. 1] IN THE COURT OF CLAIMS

No. J-180

OAK WORSTED MILLS, a Body Corporate, Plaintiff,

v.

THE UNITED STATES, Defendant

1. PETITION—Filed April 4, 1928

To the Honorable Chief Justice and Justices of the Court of Claims:

The plaintiff, the Oak Worsted Mills, respectfully represents to this Honorable Court as follows:

1. That plaintiff is a corporation, duly organized and existing under and by virtue of the laws of the State of Pennsylvania, having its principal office and place of business at the City of Philadelphia, in the County of Philadelphia, in said State, and now is, and at all times hereinafter mentioned was, engaged in the manufacture and sale of worsted goods; and presents this, its petition and claim,

in its own right as such corporation and against the United States.

2. That on or about March 12, 1919, conformably to an act of Congress, entitled "An Act to Increase Revenue and For Other Purposes," approved April 17, 1919, and as required by the Commissioner of Internal Revenue, plaintiff filed with the Collector of Internal Revenue at Philadelphia, Pennsylvania, on form furnished to it by the said Commissioner for such purpose, its original income and profits tax [fol. 2] return for the calendar year 1918, and on an estimated tax liability for said calendar year of $80,000.00, paid to the said Collector the sum of $20,000.00, the same being the first quarterly installment as provided in Section 250 (a) of the Revenue Act aforesaid.

3. That thereafter, on or about June 16, 1919, plaintiff filed with the said Collector of Internal Revenue an amended and supplemental return, disclosing, among other things, the following:

Gross sales	$927,699.08
Cost of goods sold	756,690.68
Invested capital taxable year	116,935.19
Net income	124,488.61
War and excess profits tax (Sec. 301)	87,836.07
Tax at 12%	4,158.30
Total war profits, excess profits and income tax	$91,944.37

The amended and supplemental return indicated an additional amount due (computed under Section 301 of said Act) of $71,944.37, which said amount was, in due course, paid to the said Collector, making in all a total sum of $91,944.37 so paid on a net income of $124,488.61.

4. Thereafter and on or about June 27, 1921, plaintiff filed with the Commissioner of Internal Revenue through the office of the aforesaid Collector a formal application for assessment of its profits tax for said year under the provisions of Sections 327 and 328 of the Revenue Act aforesaid. Said application was attached to a formal claim for refund of taxes in the sum of $33,425.75, based on the application aforesaid.

5. That thereafter, in April, 1922, in consequence of said claim and appeal, said Commissioner, upon an audit of said [fol. 3] return and careful consideration of all the facts, as set forth in statements filed with said return, found the tax, assessed against plaintiff for said year, to be in excess of the amount due and caused plaintiff's said tax liability to be computed under the relief provisions of said Act and as a result thereof an overassessment was disclosed in the sum of $26,487.97.

6. That said overassessment was made the subject of a certificate of overassessment which was scheduled through the office of the Collector aforesaid for the adjustment of plaintiff's account, and duly rescheduled to the said Commissioner on or about July 14, 1922, and plaintiff was so notified by departmental letter dated that day, copy annexed, marked "Exhibit A."

7. Subsequently, said certificate, bearing date of June 21, 1922, copy annexed, marked "Exhibit B," was forwarded to and received by plaintiff together with Treasury check in the sum of $26,487.97, in payment of the refund due plaintiff on account of the overassessment aforesaid; that plaintiff accepted said check in payment of said refund of taxes erroneously assessed and collected for said year, and in due course received the proceeds thereof, all with the knowledge, consent and acquiescence of the United States, and subsequently applied the same to the payment of expenses incident to the procuring of said refund and otherwise to its own use and benefit.

8. That on or prior to March 26, 1924, said Commissioner, without plaintiff's knowledge or consent, assumed to and did make a re-examination of plaintiff's said application and claim which he had so allowed as herein set forth, and assumed to decide and did decide that his previous de- [fol. 4] termination of plaintiff's tax liability for said calendar year 1918, as computed under the relief provisions of the Revenue Act of 1918, was erroneous, and assumed to decide and did decide that an additional tax of $13,756.02 was then due on account of the overassessment, which he had previously determined, having been erroneous.

9. That thereupon said Commissioner, by a departmental letter dated that day, of which a copy is hereto annexed, marked "Exhibit C," advised plaintiff of said re-examination and re-determination, and notified it, among other things, that said amount of $13,756.02 would be listed for assessment immediately without giving the usual thirty-day notice as provided in Section 250(d) of the Revenue Act of 1921, and that said amount was listed as an additional assessment on a schedule which was approved by said Commissioner shortly thereafter.

10. In due course and upon notice and demand from the said Collector of Internal Revenue for payment of the alleged additional tax, plaintiff filed on or about April 12, 1924, with the said Commissioner and also with the said Collector claims in abatement of and protest to the said alleged additional tax on the grounds that the original determination resulting in the refund aforesaid of $26,487.97 was lawfully made; that the plaintiff's tax liability had theretofore been adjudicated and had therefore become res judicata; that the said assessment was barred by the statute of limitations. Thereafter, in due course, plaintiff filed with the said Commissioner a brief in support of said claim in abatement.

[fol. 5] 11. That on or about July 28, 1924, the aforesaid brief, in support of plaintiff's protest to the findings of the Special Assessment Section, Income Tax Unit of the Bureau of Internal Revenue, was transmitted by said Unit to the Commissioner of Internal Revenue for his decision thereon, accompanied by a letter, copy of which is hereto annexed, marked "Exhibit D," purporting to state the issues, facts and contentions respecting the said determination and alleged additional assessment.

12. That on or prior to February 11, 1925, the said Commissioner of Internal Revenue, after another alleged re-examination of plaintiff's case, made the third re-determination and found and so notified plaintiff by departmental letter dated that day, copy annexed, marked "Exhibit E," that the comparatives used in determining the additional tax liability of $13,756.02 were improper and that the correct tax for said year was $72,916.66, and that it had been

overassessed the sum of $6,345.76, and further notified plaintiff that its claim in abatement of $13,756.02 would be rejected for $7,410.26.

13. That on or about August 27, 1925, the said Collector, in writing, made the second demand for payment of the aforesaid alleged additional tax of $7,410.26 and penalty in the sum of $592.82, accompanying said demand with a threat to enforce such payment by seizure and sale of plaintiff's property, and that on, or about September 5, 1925, plaintiff fearing that otherwise said Collector would carry out said threat, and in order to avoid the seizure and sale of its property as aforesaid, paid, under protest, to the [fol. 6] said Collector the amount of said alleged additional tax with penalty, making a total of $8,003.08.

14. That pursuant to the statute in such cases made and provided and the regulations prescribed by the Secretary of the Treasury, plaintiff on or about May 7, 1927, duly made and filed with said Collector, a claim for refund, complete copy of which is hereto annexed, marked "Exhibit F," of $6,345.76 (or such greater amount as is legally refundable), so illegally levied, assessed and collected as above alleged, with interest, which claim for refund was duly verified and contained on Form 843 as prescribed by said regulations and was made on the grounds: (1) That the alleged tax was erroneous, excessive and illegal; (2), That the Collection of the same was barred, at time of payment, by the tolling of the statute of limitations, for the following reasons, to-wit: (a) That payment was exacted more than five years after the return was filed; (b) that no suit or proceeding was instituted within the five-year period; (c) that the return was not false or fraudulent, neither had "both the Commissioner and the taxpayer consented in writing to a later determination, assessment, and collection of the tax," and (3) that, by reason of the expiration of the statute of limitations applicable, not only was the procedure for its collection barred, but the right, if any, of the Government to the alleged tax itself was extinguished. Reference was made to said claim in abatement together with the supporting evidence and brief, all of which was re-affirmed and made a part of said claim for refund with the same force and effect as if thereto at-

tached; the right was thereby expressly reserved to submit additional facts, evidence, etc., in support of said claim by brief or otherwise, which should be made a part thereof [fol. 7] as though attached thereto, and plaintiff further claimed its right to any and all benefits given to it by any other Revenue Act pertinent in the premises.

19. That on or about February 15, 1928, said Commissioner rejected plaintiff's claim for refund, aforesaid, on the theory that the assessment was made within the statutory period and that Section 278(d) of the Revenue Act of 1924, granting six years within which to make collection, was applicable and so notified plaintiff by departmental letter dated that day, copy annexed marked "Exhibit G."

20. Plaintiff avers that no action has been had other than as aforesaid, either by Congress or by any of the Departments of the Federal Government, except plaintiff filed an appeal with the United States Board of Tax Appeals, created under the Revenue Act of 1924, and pending which, due to the issuance of a warrant of distraint against its property, plaintiff by application for a writ of injunction, undertook to restrain the collection of said alleged additional tax. Said injunction having been denied and to avoid the threatened seizure and sale of its property as aforesaid, plaintiff paid the alleged aforesaid additional tax and, for alleged lack of jurisdiction, the aforesaid Board of Tax Appeals, on motion of the said Commissioner, dismissed the plaintiff's said appeal; that its claim for abatement and refund aforesaid, and all of the proceedings had and taken by plaintiff before the Commissioner of Internal Revenue and the Treasury Department were, in all things, duly presented and made in accordance with and pursuant to the statutes, rules and regulations; and that the said defendant, the United States, through and by its Commissioner of [fol. 8] Internal Revenue and Secretary of the Treasury, still has and retains, unlawfully, the amount of money hereinbefore and hereinafter complained of.

21. Plaintiff avers that the Commissioner lawfully considered and allowed its application for assessment of its profits tax under the provisions of Sections 327 and 328 of the Revenue Act of 1918, resulting in a refund of $26,487.97;

that said Commissioner found, as a matter of fact, that plaintiff had been over-assessed and had overpaid the tax imposed by said Act, which said refund in said amount was lawfully refunded to plaintiff under Section 3220 of the Revised Statutes as amended; that said finding and decision of the Commissioner, with all the facts of plaintiff's case before him, were upon the merits of said application and claim; that the same were not due to fraud or error in mathematical calculation. That in all things plaintiff verily believes and therefore avers, the United States is bound and concluded thereby.

22. Plaintiff avers that the act of the Commissioner of Internal Revenue, in considering its application and claim as aforesaid and determining the said overassessment of $26,487.97, was the last and final act within his power to do and perform respecting plaintiff's tax liability for the calendar year 1918. That when the aforesaid refund of $26,487.97, based on said overassessment, was allowel by the Commissioner and accepted by it the Commissioner had exhausted his jurisdiction. He was functus officio.

23. Plaintiff avers that it had therefore paid the sum of $91,944.37, as taxes, for said year 1919. That said amount [fol. 9] represents the maximum amount assessable under the statutes; that the said alleged additional assessment and collection of $7,410.26 represents a total payment, as alleged taxes, an aggregate sum of $99,355.23, for said year, therefore, the said additional assessment, so-called, is not an assessment of an additional tax, but is a re-assessment of an original tax which had theretofore been erroneously assessed and collected but subsequently lawfully refunded and paid back and accepted by plaintiff, at which time the question of its tax liability became and was thereafter res judicata.

24. Plaintiff avers that it never at any time owed to the that said Commissioner found, as a matter of fact, that in excess of $65,506.40. That its said tax liability for said calendar year 1918 should have been originally computed under the relief provisions of the Revenue Act of 1918, by reason whereof the said amount of $91,944.37, assessed and paid, under said Section 301, as aforesaid, exceeded by $26,487.97, the amount of taxes lawfully due.

25. Plaintiff avers that its obligation to the United States for taxes for the calendar year 1918 had theretofore been discharged by payment in full, and the assessment therefore was no longer in force. That the alleged additional assessment of $13,756.02 by the Commissioner was not and could not be, in any sense, a tax, as by his prior act, he had exhausted all administrative and executive authority he had over the subject. That his act in making said re-determination and alleged additional assessment was illegal, in that it was merely an attempt to collect moneys which he claimed had been erroneously paid out by him or upon his author- [fol. 10] ity. That the courts alone are clothed with authority to pass upon and determine the legality and correctness of his act in finding the over-assessment resulting in the refund aforesaid. That the act of the Commissioner, in making the alleged re-determination and so-called additional assessment and collection as aforesaid, arrogated authority which Congress, under the Constitution, is powerless to confer. That in so doing he usurped the functions of the Judiciary in violation of Article III, Section I of the Constitution.

26. Plaintiff avers that the aforesaid illegal and unconstitutional acts of the Commissioner, in making the said alleged additional assessment and later collecting the same by means of threatened distraint, thus by compulsion forcing plaintiff to pay the alleged additional tax, denied the plaintiff the right of intervention and protection of the Judiciary and strikes down its legal vested property rights by taking its property without due process of law, in violation of the Fifth Amendment to the Constitution. That it also violates the Seventh Amendment to the Constitution in that it denied to the plaintiff the right of trial by jury.

27. Plaintiff avers that the Commissioner of Internal Revenue, upon its application theretofore filed, having found and declared of record (as provided in subdivision (d) of Section 327 of said Act) that the tax, if determined without the benefit of said Section would, owing to abnormal conditions affecting the capital and/or income of plaintiff, work upon plaintiff an exceptional hardship, evidenced by gross disproportion between the tax computed without benefit of said Section and the tax computed by reference

to representative corporations specified in Section 328, and [fol. 11] having theretofore correctly computed said tax according to the provisions of said Section, and having theretofore lawfully refunded and paid back the overassessment aforesaid, the United States was and is, in the absence of fraud, forever estopped from asserting the alleged additional tax libility.

28. Plaintiff avers that the aforesaid acts of the Commissioner of Internal Revenue in assuming authority to review, re-determine and revise his previous computation of plaintiff's taxes for the said calendar year, and to reassess and collect the same by means of threatened distraint, as aforesaid, is unprecedented, arbitrary and capricious.

29. Plaintiff avers that the Commissioner of Internal Revenue having lawfully considered its application and claim as aforesaid and having refunded and paid back the overassessment and the plaintiff having accepted said refund in good faith and made application thereof as aforesaid, said subsequent reassessment and collection by said Commissioner of Internal Revenue, through unlawfully inflating himself into both judge and executioner, as aforesaid, has already worked upon plaintiff an exceptional hardship and will, unless the relief herein prayed for be granted, result in irreparable injury.

30. Plaintiff avers that, in any case, the collection of said alleged additional tax was illegal and in violation of Section 250(d) of the Revenue Act of 1921, as the period of limitations, as provided therein, had already expired; that said statute of limitations began to run on March 12, 1919, the date on which plaintiff's original return was filed; that no [fol. 12] suit or proceeding was begun within five years after the filing of said return; that no consent in writing was entered into between the Commissioner and plaintiff for a later determination, assessment, and collection of the tax as provided in said sub-section.

31. Plaintiff avers that it has never received but is entitled to lawful interest, on the refund of $26,487.97 aforesaid.

32. Plaintiff avers that it is now, and has always been, the sole owner of the claims hereinbefore referred to, and

that it has not assigned or transferred the same, or any part thereof, or interest therein, and that the same is just, due and unpaid; that it has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided or abetted or given encouragement to rebellion against the said government, and that it believes the statements herein made to be true, and that it is entitled to the full amount of its claims from the United States, after allowing all just credits and off-sets.

Wherefore, the premises considered, plaintiff prays judgment against the Uuited States in the principal sum of $8,003.08, with lawful interest from September 8, 1925, and lawful interest on the refund of $26,487.97 aforesaid.

Guil Barber, Attorney for Plaintiff.

Address of Plaintiff's Attorney: Guil Barber, 816-818 Denrike Bldg., 1010 Vermont Ave. N. W., Washington, D. C.

[fol. 13] *Duly sworn to by Clarence L. Mitchell. Jurat omitted in printing.*

[fol. 14] EXHIBIT A TO PETITION

Copy

Treasury Department, Washington.

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:Ad:R:CC:HJH.

July 14, 1922.

Oak Worsted Mills, B and Tioga Streets, Philadelphia, Pennsylvania.

Attention Mr. Clarence L. Mitchell

SIRS: Receipt is acknowledged of your letter dated June 14, 1922, relative to your claim for refund of $48,204.81, income tax for the years 1917 and 1918.

In reply you are advised that the records of the Bureau indicate the receipt of the above-mentioned claim, also a claim in the amount of $1;457.00 for the year 1919.

You are advised that the schedule which included the certificates of overassessment covering your income tax for the years 1918 and 1919 has been returned to this office by the Collector of Internal Revenue for your District. Final settlement will be made within a very short time.

Respectfully, E. H. Batson, Deputy Commissioner,
by C. B. Allen.

[fol. 15] EXHIBIT B TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Certificate of Overassessment

Income Tax Unit

IT:SA:SM. Number: 196,707.
LP-A5148. Allowed: $26,487.97.

Oak Worsted Mills, B and Tioga Sts., Philadelphia, Pa.

SIRS: An audit of your income tax return for 1918, Form 1120, and examination of related claim (if any), indicates that the amount of tax assessed to you for this year was in excess of the amount due:

After careful consideration of all the evidence submitted, you are advised that your appeal for assessment under Sections 327 and 328 of the Revenue Act of 1918, has been allowed.

The result thus determined, after giving effect to the necessary changes in net income, developed through audit of the return, indicates an overassessment of $26,487.97, specific details of which are as follows:

Net income reported		$124,488.61
Add taxable Liberty Bond interest	$732.82	
Less reserves for discount	2.15	
		730.67
		$125,219.28

(For computation of tax, see page 2 attached.)

The amount of the overassessment will be applied as follows:

1. If the tax has not been paid, the amount will be abated by the Collector of Internal Revenue for your district.

[fol. 16] 2. If the tax has been paid, the amount of the overpayment will either be credited against the tax due (if any) on income returns of years other than that on which the overpayment was made; or

3. The balance (if any) of the overpayment is refunded to you by check of the Treasury Department, forwarded herewith.

Respectfully, E. H. Batson, Deputy Commissioner, by S. A. Alexander, Head of Division.

Schedule Number: 1317. District: 1st Pa. Account Number: 1919-402107. Amount refunded: $26,487.97. Instructions executed June 21, 1922.

B. D. McCaughn.

Computation of Tax

Profits tax			$57,736.39
Net income		$125,219.28	
Interest, U. S. Bonds	$732.82		
Profits tax	57,736.39		
Exemption	2,000.00		
		60,469.21	
Amount taxable at 12%		$64,750.07	7,770.01
Total tax assessable			$65,506.40
Tax previously assessed			91,994.37
Indicating an overassessment of			$26,487.97

[fol. 17] EXHIBIT C TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:E:SM. WWB-A-5148.

March 26, 1924.

Oak Worsted Mills, B and Tioga Streets, Philadelphia, Pa.

Sirs: Reference is made in your income and profits tax return, Form 1120, for the calendar year 1918 and to a certificate of overassessment issued by this office in your favor, in the amount of $26,487.97, computed under the provisions of Sections 327 and 328 of the Revenue Act of 1918.

A reexamination has been made of your application under the provisions of Sections 327 and 328 of the Revenue Act of 1918, together with all other evidence in the case, and you are advised that the above-mentioned determination of your tax liability was erroneous.

A correct computation of your tax under Sections 327 and 328 of the Revenue Act of 1918 has been made and the additional assessment necessary to correct the excessive overassessment erroneously determined will be listed immediately without giving the usual thirty days' notice, as provided in Section 250(d) of the Revenue Act of 1921. A detailed computation of the amount of this additional assessment is shown in the attached statement.

The Bureau will, therefore, entertain a claim in abatement if filed within ten days of receipt of notice and demand from the Collector of Internal Revenue for your district in accordance with the provisions of Article 1006, Regulations 62.

[fol. 18] An appeal covering the basis of the claim should be filed setting forth in full all information upon which you base your protest against the above assessment and any additional facts in support of your claim for the application of the relief provisions of the Revenue Act of 1918. This appeal should be filed in triplicate and should be addressed to the Commissioner of Internal Revenue for the specific attention of IT:E:SM-WWB-A-5148.

If an appeal is not filed, under no circumstances should payment be made until a bill is received from the Collector

of Internal Revenue for your district and remittance should then be made to him.

Respectfully, J. G. Bright, Deputy Commissioner.

Statement

IT:E:SM. WWB-A-5148

In re Oak Worsted Mills, B and Tioga Streets, Philadelphia, Pa.

Computation of 1918 Tax under Section 328

Net income as shown by agent's report			$125,219.28
Profits tax, Section 328			73,368.23
Net income		$125,219.28	
Less:			
Interest on U. S. obligations not exempt	$732.82		
Profits tax	73,368.23		
Exemption	2,000.00		
		76,101.05	
Balance taxable at 12%		$49,118.23	
Tax at 12%			5,894.19
Total tax liability			$79,262.42
Original tax, June, 1919, account #402107		$91,994.37	
Less overassessment		26,487.97	
			65,506.40
Additional tax due			$13,756.02

[fol. 19] Exhibit D to Petition

IT:E:SM. WWB-A-5148

From: Special Assessment Section, Income Tax Unit.
To: Commissioner of Internal Revenue.

Case of Oak Worsted Mills, B and Tioga Streets, Philadelphia, Penn. Incorporated April 14, 1916. Business: Manufacture of cotton cloth, undyed and unfinished.

Statement

Year under audit: 1918.
Additional Tax: $13,756.02.

Issues

The issues raised in appellant's brief filed upon appeal are:

(1) That audit under Section 328 of the Revenue Act of 1918 showing a total tax liability of $65,506.40, should be sustained, and should not be changed as proposed in office letter dated March 26, 1924.

(2) That the Commissioner of Internal Revenue is without authority to reopen a case, once closed with overassessment determined and accepted by the taxpayer and payment made by the Treasurer of the United States of such refund as found due.

Facts

(1) The previous audit made in April, 1922, indicated a total tax liability of $65,506.40. The audit of March 26, 1924, shows a tax liability of $79,262.42.

Taxpayer's Contention

(1) That the previous audit should be sustained because the adjustment was equitable and just.

[fol. 20] Unit's Contention

(1) The Unit is unable to concede the taxpayer's contention for the reason that the overassessment indicated by the previous audit is erroneous.

Facts

(2) The taxpayer filed on June 16, 1919, an income and profits tax return showing a total tax liability of $91,994.37, which was assessed and paid.

On December 19, 1922, a Revenue Agent made a report on his examination of taxpayer's books and accounts, which indicated an additional tax due for 1918 of $426.14.

The Unit in April, 1922, reduced appellant's income and profits tax liability $26,487.97, based on a computation of appellant's profits taxes under Section 328 of the Revenue Act of 1918.

The Unit in March, 1924, redetermined appellant's income and profits tax liability under the provisions of Section 328 of the Revenue Act of 1918, and found the total income and profits tax of taxpayer to be $79,262.42. The difference between this amount and the taxes paid, $13,756.02, was assessed March 26, 1924.

Appellant's Contention

(2) In appellant's brief, sworn to April 21, 1924, it is contended that the Commissioner of Internal Revenue has no authority to reopen this case.

Unit's Contention

(2) The Unit can not concede the taxpayer's contention for the reason that the Commissioner of Internal Revenue is empowered by Section 250 of the Revenue Act of 1918 to make the assessment appealed against. In support of this contention, office decision 1968, ruling No. 111-14-1479 is cited.

The additional tax referred to has been assessed and abatement claims filed.

[fol. 21] A copy of this letter of transmittal is being forwarded to the taxpayer for its information.

(Signed) J. G. Bright, Deputy Commissioner.

Enclosures

1. Appellant's brief, April 21, 1924, in triplicate.
2. Claim for abatement, $13,756.02, 1918.
3. Income and profits tax return, 1918.

a. Tentative return.
b. Statement relative inventories.
c. Balance sheets, December 31, 1917 and 1918.
d. Stock ownership statement.
e. Schedules A-2, A-12, A-13, A-14, A-18, A-23, A-24.
f. Superficial audit record.

g. Data and key sheets, April 19, 1922,-
h. Confidential Memorandum April 19, 1922.
i. Data and Key Sheets, March 26, 1924.
4. Revenue Agent's report, December 19, 1921.
5. Correspondence and appellant's original application for assessment under the provisions of Section 328 of the Revenue Act of 1918.
6. Income and excess profits tax returns, 1917, with enclosures.
7. Working papers, 1918 consideration.
8. Working papers, 1917 consideration.

lvgG.

[fol. 22] EXHIBIT E TO PETITION

Treasury Department, Washington

IT:E:SM. CDL-A-5148

Feb. 11, 1925.

Oak Worsted Mills, B and Tioga Streets, Philadelphia, Pennsylvania

SIRS: Reference is made to your income and profits tax return for the calendar year 1918 and to your protest dated April 21, 1924, and additional information subsequently submitted.

You are advised that after a thorough review of your case, the Bureau holds that the Commissioner of Internal Revenue may assess any tax found to be due even though such tax may have been previously erroneously abated or refunded, provided that such assessment is made within the time prescribed by statute; and that the comparatives previously used in the determination of your tax liability under the provisions of Section 328 of the Revenue Act of 1918 were improper.

A redetermination of your tax liability under the provisions of Section 328 of the Revenue Act of 1918 is as follows:

Net Income

Net income	$125,219.28

Computation of Tax

Profits tax, Section 328			$66,157.14
Net income		125,219.28	
Less:			
Interest on U. S. obligations not exempt	$732.82		
Profits tax	66,157.14		
Exemption	2,000.00		
	%	68,889.96	
Amount taxable at 12%		$46,329.32	6,759.52
Correct tax liability (1918)			$72,916.66
[fol. 23] Amount brought forward			$72,916.66
Previously assessed:			
Original assessment (account 402107)		$91,994.37	
Additional assessment (March, 1924, P. O. L. 3, Spl. 22)		13,756.02	
Total		$105,750.39	
Less overassessment April 20, 1922		26,487.97	
Net tax assessed			$79,262.42
Correct tax liability			72,916.66
Overassessment (1918)			$6,345.76

In accordance with the above conclusions your claim for the abatement of $13,756.02 will be rejected for $7,410.26.

The Collector of Internal Revenue for your district will notify you as to the time and manner of making payment.

Upon receipt of notice and demand from that official payment should be made to his office in accordance with the conditions of his notice.

Your case is, therefore, deemed closed by the Bureau.

Respectfully, J. G. Bright, Deputy Commissioner.

[fol. 24] EXHIBIT F TO PETITION

Claim for
Abatement of Tax Assessed

Credit Against Outstanding Assessments

X Refund of Taxes Illegally Collected

Refund of Amounts Paid for Stamps Used in Error or Excess

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Oak Worsted Mills, B and Tioga Streets, Philadelphia, Pa.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From Jan. 1	1918
To Dec. 31	1918

1. Business in which engaged: Weaving cloth.
2. Character of assessment or tax: Income and profits tax.
3. Amount of assessment or stamps purchased: $——.
4. Reduction of Tax Liability requested (Income and Profits Tax): $——.
5. Amount to be abated: $——.
6. Amount to be refunded (or such greater amount as is legally refundable) plus interest: $6,345.76.
7. Dates of payment (see Collector's receipts or indorsements of canceled checks): Sept. 5, 1925.

(If statement covers income tax liability, items 8–11, inclusive, must be answered.)

8. District in which return (if any) was filed: ——.
9. District in which unpaid assessment appears: ——.

[fol. 25] 10. Amount of overpayment claimed as credit: $——.

11. Unpaid assessment against which credit is asked; period from —— to ——: $——.

Deponent verily believes that this application should be allowed for the following reasons:

1. That the alleged tax is erroneous, excessive and illegal.

2. That the collection of said alleged tax was barred, at time of payment, by the tolling of the statute of limitations, for the following reasons, to-wit:

a. That payment was exacted more than five years after the return was filed;

b. That no suit or proceeding was instituted within the five-year period;

c. That the return was not false or fraudulent, neither had "both the Commissioner and the taxpayer consented in writing to a later determination, assessment, and collection of the tax." (See Sec. 250(d), Rev. Act 1921.)

3. That, by reason of the expiration of the statute of limitations applicable, not only was the procedure for its collection barred, but the right, if any, of the Government to the alleged tax itself, is extinguished.

(See U. S. Supreme Court decision Bowers v. New York & Albany Lighterage Co., Same v. Seaman, Same v. Fuller, Nos. 366,–7 & 8, delivered Feb. 21, 1927, also Toxaway Mills v. U. S., reversed decision Court of Claims on motion Sol Gen., Mar. 17, 1927. Also U. S. v. Cabot, Sup. Ct. Dist. Col., June 15, 1926; also U. S. v. Whyel, Dist. Ct. U. S., W. D. of Pa., Equity #1227.)

Reference is here made to a Claim in Abatement together with supporting evidence and brief, heretofore filed with the Commissioner of Internal Revenue in reference to the said alleged tax, all of which is hereby reaffirmed and made [fol. 26] a part hereof with the same force and effect as if hereto attached.

The right is hereby expressly reserved to submit additional facts, evidence, etc., in support of this claim by brief or otherwise, which shall be made a part hereof as though attached hereto.

Deponent further claims its right to any and all benefits given to it by any other Revenue Act pertinent in the premises.

Interest demanded.

(Signed) Oak Worsted Mills, by Clarence L. Mitchell, Treasurer. (Seal.)

Sworn to and subscribed before me this 2d day of May, 1927. Jean S. Boyer, Notary Public. (Seal.)

[fol. 27] EXHIBIT G TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:E:RR. JSR.

February 15, 1928.

Oak Worsted Mills, B and Tioga Streets, Philadelphia, Pennsylvania.

SIRS: Reference is made to your claim for refund in the amount of $6,345.76 filed with respect to the taxable year 1918.

It appears that your return of income for the taxable year 1918 was filed on June 16, 1919, disclosing tax due of $91,994.37. Subsequently, or in March, 1924, an additional tax of $13,756.02 was assessed. A claim for abatement was filed covering the additional tax and upon consideration such claim was allowed in the amount of $6,345.76 and rejected in the amount of $7,410.26. A Certificate of Overassessment was issued for $6,345.76 and such amount was abated. A payment of $7,410.26 was made under date of September 10, 1925.

In your claim for refund you contend that inasmuch as payment of the tax in question was made subsequent to the five-year period provided by Section 250(d) of the Revenue Act of 1921, collection thereof as of the date of payment was barred, and that such payment should be refunded.

As previously stated your return of income for 1918 was filed on June 16, 1919, and the five-year period within [fol. 28] which the Government could assess and collect taxes due for that year expired on June 16, 1924, or subsequently to the passage of the Revenue Act of 1924. This office has consistently held that in those cases where the five-year period within which taxes due for 1918 could be assessed and collected expired subsequent to the enactment of the 1924 Act, the six-year collection period provided by Section 278(d) of that Act is applicable.

In view of the fact that the tax in question was assessed within the five-year period provided by Section 250(d) of the Revenue Act of 1921 and collection thereof made within the six-year period provided by Section 278(d) of the Revenue Act of 1924, this office is of the opinion that such tax was legally collected and can not be refunded.

Your claim is, accordingly, rejected and the rejection will officially appear on the next schedule to be approved by the commissioner.

Respectfully, C. B. Allen, Deputy Commissioner.

[fol. 29] II. General Traverse—Filed May 14, 1928

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. Argument and Submission

On May 13, 1929, this case was argued and submitted on merits by Mr. William Meyerhoff, for the plaintiff, and by Mr. George H. Foster, for the defendant.

[fol. 30] IV. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Green J.**—Filed December 2, 1929

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special Findings of Fact

I

On or about March 12, 1919, the plaintiff, a corporation, filed with the collector of internal revenue at Philadelphia, Pennsylvania, for the calendar year 1918, a paper (Form 1031 T) headed "Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return," and on March 20, 1919, paid the sum of $20,000.00 as one-fourth of the estimated tax of $80,000.00 shown on said tentative return.

II

On June 16, 1919, the plaintiff filed a detailed corporation income and profits tax return for the calendar year 1918 on Form 1120, provided by the Bureau of Internal Revenue, setting forth in the various schedules therein the detailed information provided for in said form, showing a total net income of $124,488.61, with a normal tax due of $4,158.30 and an excess-profits tax of $87,836.07, making a total tax for said year of $91,994.37, and paid the balance of $71,994.37, due on said taxes in three installments during the year 1919, as follows:

June 16, 1919	$25,997.19
September 15, 1919	22,998.59
December 15, 1919	22,998.59

III

On or about June 27, 1921, plaintiff duly filed a formal application for assessment of its profits tax under the provisions of sections 327 and 328 of the revenue act of 1918. [fol. 31] Said application was attached to a formal claim for refund of taxes alleged to have been illegally collected for the year 1918 in the sum of $33,425.75 and was based on said application for special assessment.

IV

In the month of April, 1922, the Commissioner of Internal Revenue, in consequence of said application and claim, caused plaintiff's tax liability to be computed under the

relief provisions of said act and found, as a result thereof, that plaintiff had been overassessed the sum of $26,487.97. Said overassessment was made the subject of a certificate of overassessment bearing date of June 21, 1922, which was forwarded to and received by plaintiff together with a Treasury check in the sum of $26,487.97, and in due course plaintiff received the proceeds thereof.

V

On or prior to March 26, 1924, the commissioner without plaintiff's knowledge or consent made a reexamination of plaintiff's application and decided and so notified the plaintiff by letter dated that day that his previous determination in finding the total tax assessment to be $65,506.40 was erroneous, and decided that the "total tax liability" under sections 327 and 328 was $79,262.42, and that additional tax in the amount of $13,756.02 was due, and shortly thereafter made an assessment of said additional tax. This assessment of additional tax was made more than five years after the instrument referred to in Finding I was filed.

VI

On April 12, 1924, upon notice and demand for payment of said collector, plaintiff filed a claim in abatement of the alleged additional tax of $13,756.02, on the grounds that the matter had become res judicata and was also barred by the statute of limitations and by the provisions of the revenue acts then in force.

VII

On or about February 11, 1925, the said commissioner made another redetermination of plaintiff's tax liability for the year 1918 and notified plaintiff by departmental letter that the comparatives used in his previous redeterminations were erroneous and that plaintiff had been overassessed $6,345.76, and that claim in abatement of $13,756.02 would be rejected for $7,410.26, and certificate of overassessment in the amount of $6,345.76 thereafter issued. On or about March 26, 1925, plaintiff filed an appeal from the alleged deficiency of $7,410.26 with the United States Board of Tax Appeals.

VIII

On June 1, 1925, said collector again demanded payment in writing, advising plaintiff that distraint warrant had been issued, and unless payment was made promptly said warrant would be placed in hands of deputy collector for [fol. 32] personal service. On or about June 22, 1925, in the District Court of the United States for the Eastern District of Pennsylvania, a temporary restraining order was issued against the said collector pending disposition of a motion for a preliminary injunction, pending the aforesaid appeal to the Board of Tax Appeals, which said motion was denied on or about July 1, 1925.

IX

On August 27, 1925, said collector again demanded payment of the amount of $7,410.26, with interest in the sum of $592.82, and, under threat of seizure and sale of plaintiff's property, payment of the total sum of $8,003.08 was made to collector, under protest, on September 10, 1925.

X

On November 18, 1925, the said appeal to the United States Board of Tax Appeals was dismissed on motion of counsel for the said commissioner on the ground that the assessment had been paid and therefore the said board was without jurisdiction.

XI

On May 7, 1927, plaintiff filed a claim, on Form 843, for refund of $6,345.76 (or such greater amount as is legally refundable). Said claim for refund was rejected on or about February 15, 1928. The form of the claim for refund is not in controversy.

XII

The total tax as finally determined by the said commissioner is $72,916.66, all of which, with interest in the sum of $592.82, has been paid as aforesaid, and is retained by the United States. $688.32 was paid to the plaintiff as interest

from December 27, 1921, to June 2, 1922, on the refund of $26,487.97 made in June, 1922, as overpayment on plaintiff's 1918 income and profits tax.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is not entitled to recover and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Opinion

Green, Judge, delivered the opinion of the court:

A so-called tentative return was filed by the plaintiff on March 12, 1919, and as the assessment in controversy was made on March 26, 1924, the plaintiff claims that the five-year period of limitations for the assessment of taxes had [fol. 33] expired, and that the assessment was therefore illegal. The defendant contends that the limitations period did not expire until five years from June 16, 1919, when the completed return was filed, and this presents the first question for our consideration.

The Board of Tax Appeals has consistently held in a number of cases that the filing of the so-called tentative return did not start the running of the statute of limitations. See Matteawan Mfg. Co., 4 B. T. A. 953 . In this conclusion we concur for many reasons which will require a review of the proceedings which lead up to the filing of the tentative return, in order to ascertain its purpose and what was understood with reference thereto by both the Bureau of Internal Revenue and the taxpayer. The "revenue act of 1918," was not approved until February 24, 1919. It was quite plain to everyone that large business concerns and individuals having large business interests would have great difficulty in filing a return within the time required by law, and the Bureau of Internal Revenue would be deluged with requests for extension of time for filing returns. In fairness to the taxpayers, the most of these applications would

have to be granted. The result would be to postpone the payment of taxes in such amount that the Government might become embarrassed for want of revenues, for although the World War was over the Government was still being carried on at an enormous expense. In order to overcome this difficulty a plan was devised which provided the needed funds for the Government and certainly was a valuable concession to the taxpayers who brought themselves within its terms, by granting them an extension of time for filing complete returns. A circular was issued by the commissioner on February 27, 1919, giving the particulars of this plan as follows:

"Income taxpayers, both corporation and individual, were today granted by the Internal Revenue Bureau further relief with respect to the filing of their completed tax returns for 1918. The statement that the taxpayer is unable by March 15 to execute and file the complete return will be accepted, under the new procedure, as sufficient reason for extending for forty-five days the time for filing complete income and excess-profits returns, provided in every case the taxpayer pays on or before March 15, at least 25% of the estimated amount of the tax due."

It further stated that a supply of blanks for the use of taxpayers would be furnished for making a tentative return, and that the due date for the payment of taxes would not be extended nor would the taxpayer be relied of interest if the amount paid was short of the amount eventually found due. The blank form furnished to and used by plaintiff was headed, "Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return," and contained no statement whatsoever showing the gross income, deductions, invested capital, or other details necessary for a proper determination of plaintiff's tax liability. It merely estimated the tax to be $80,000.00 and accordingly $20,000.00 was paid on the taxes. It specifically requested an extension of time for filing the "return" and in this connection we are at a loss to understand what return could possibly be meant except the return required by law. The tentative return was not only not required by the law but there was no pro-

[fol. 34] vision in the law for it. It was merely an invention of the commissioner and its purpose was to give the taxpayer an extension of time for filing the return required by law and at the same time obtain the needed funds for the Government. The statute (section 250, act of 1918) provided that the tax shall be assessed within five years "after the return was due or was made." What return? The return not authorized by law and not referred to in the statutes? Clearly not. It was the return which the law required and which was not made by the tentative return. The return on which the statute of limitations is made to depend is the return required by section 23, which is very different from the so-called tentative return. In this connection we have no reference to returns where the taxpayer attempts to comply with the law but through error or mistake does not completely conform to its requirements. We have here a case where there was no pretense as far as making the return was concerned that the law was being complied with. There was merely enough done so that the commissioner would grant the extension of time.

If we look at the matter from the standpoint of equity between the Government and the taxpayer we can come to no other conclusion. The Government had five years in which to make an assessment on a different basis from the return, but surely this ought to be from the time when the taxpayer makes such a return as will enable the bureau to get at least some elementary knowledge as to how much tax he ought to pay. We think no one would contend that the taxpayer could merely file this tentative return and stop there without filing another and completed return but if the contention of the plaintiff is correct and this was a real return in the sense that the word "return" is used in the statute, nothing else was required.

It is argued that if the tentative return was not a return at all but merely an application or an agreement for an extenison of time, the taxpayer was not bound to pay the first installment of his taxes until he filed the completed return. This argument overlooks the fact that the whole proceeding was a concession to the taxpayer beyond any requirement of the law, for the commissioner might grant or refuse an extension in his discretion, and having that right he could prescribe the terms on which an extension should be granted. The proposition on the part of the commissioner

was simply that if the taxpayer would file an estimate of his taxes and a request for extension of time for filing a return and make payment of one-fourth the estimated tax, the extension would be granted, and he had a right to make these requirements.

It is also argued that the Government is taking inconsistent positions; that it says at one time that the tentative return was a return and then when its interests require the contrary, says it is no return, but we find nothing inconsistent in its position. It has at no time stated that the so-called tentative return would be considered as the return required by law. On the contrary, the fact that an extension of time was granted for filing a complete return shows very clearly that it did not so consider it, otherwise no extension of time would have been necessary; and while we do not think it is material what the taxpayer understood, we are unable to see how it could have understood otherwise. The only meaning given in the dictionary to the word [fol. 35] "tentative" which would at all apply to the situation under consideration is "experimental," and while this meaning may apply to some features of the case we are inclined to think that the common or colloquial meaning of the word "tentative" in such situations is with reference to something that will do or will answer for the time being but no further.

For the reasons above stated we concur in the view taken upon this question by the Board of Tax Appeals and by the Circuit Court of Appeals in the case of Florsheim Bros. Dry Goods Co. v. United States, 29 Fed. (2d) 895, and hold that the limitation did not begin to run until the completed return was filed and that the tax in question was assessed within the period prescribed by the statute.

Plaintiff also contends that the Commissioner of Internal Revenue having determined the tax liability of the plaintiff in April, 1922, was without authority to revise it, and that his later action making a new assessment was in excess of his authority, and the new assessment was therefore illegal.

We do not think it is necessary to discuss this question at length. The practice of the commissioner in making new and different assessments is of so long standing and has met with such general acquiescence that this in itself constitutes a strong reason rejecting the contention of plain-

tiff. Ever since the Federal income-tax laws have been enacted, this practice has been going on. Congress has not merely acquiesced in it, but by various enactments has recognized the practice and has gone so far as to provide in the revenue act of 1921, which of course was not applicable to this case, a limitation on the reopening of cases. The cases cited by plaintiff with reference to the acts of some official of the Government whose action is by law made final have no application here. The determinations of the commissioner are not binding on the taxpayer but are merely a prima facie regulation. Wickwire v. Reinecke, 275 U. S. 101. The distinction is clearly made in Fidelity & Columbia Trust Co. v. Lucas, 7 Fed. (2d) 146, 149. In Botany Worsted Mills v. United States, 278 U. S. 282, it appeared that the taxpayer filed a return and paid the tax on the basis thereof. Subsequently an additional assessment was made by the bureau and was paid. The implication of the decision, which held the taxpayer could not recover the amount of the additional assessment, was that the commissioner could make changes in the original assessment; and it was expressly so held by the Board of Tax Appeals in Appeal of James Couzens, 11 B. T. A. 1040, a case where the Government officials had fixed the amount of the tax which was paid by the party assessed.

While the tax in question was assessed within the period of limitations it was not collected within the time fixed thereby and if this case is controlled by the rule laid down in Bowers v. New York & Albany Lighterage Co., 273 U. S. 346, the tax involved was unlawfully collected and the plaintiff is entitled to recover. The defendant, however, contends that section 611 of the revenue act of 1928, which was passed subsequent to the decision in the Bowers case, so modifies the rule laid down therein that the court should deny a recovery in the case at bar and this contention presents a complicated question.

[fol. 36] Section 607 of the act of 1928 provides:

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto *shall be considered an overpayment* and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim." (Italics ours.)

Section 611 provides:

"If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this act) shall not be considered as an overpayment *under the provisions of section 607*, relating to payments made after the expiration of the period of limitation on assessment and collection." (Italics ours.)

There can be no question of what these sections mean. In plaintiff's argument it is said:

"Read together these sections provide that taxes assessed or paid out of time shall be credited or refunded to the taxpayer if a timely refund claim is filed *except* in cases of timely assessment made before June 2, 1924, and a claim in abatement was filed and collection of any part of the tax was stayed." With this statement we agree.

But plaintiff insists that they have no application to this case and that if so construed as to deprive plaintiff of the right of recovery herein the sections are unconstitutional.

Further in argument the plaintiff insists that section 611 has no reference to suits on the part of taxpayers and merely defines the authority of the officials of defendant in making refunds of credits. In support of this position it cites the cases of Clinton Iron and Steel Co. v. Heiner, 30 Fed. (2d) 542; Erie Coal and Coke Co. v. Heiner, 33 Fed. (2d) 135; and Gile & Jenks v. Huntley, Collector, 29 Fed. (2d) 209. All of these cases support the contention of plaintiff, but upon careful examination we are unable to agree to the rules laid down therein. In this connection, it should be noted that the case last above cited was reversed by a decision of the Circuit Court of Appeals to which reference will hereinafter be made.

In considering this contention, it should be observed at the outset that it is quite inconsistent with the meaning which is given by plaintiff's counsel to the two sections under consideration and with which meaning, as stated in the quotation from plaintiff's argument set out above, we

agree. Our reasons for differing from these decisions cited by plaintiff are as follows:

It appears to us that Congress, by the provisions in the revenue act of 1928, was endeavoring to establish a rule whereby a condition of repose would be established and when taxes had been paid after the statute of limitations had run but which were due and ought to have been paid by the taxpayer before the expiration of the time of limitations, such taxes could not be recovered by the taxpayer. Whether this general observation may be correct or not, we think it quite clear that the construction of sections 607 and 611 adopted in the decisions cited on behalf of plaintiff is [fol. 37] not correct, and that this will appear from a consideration of the logical effect of such a construction.

As we understand the argument in favor of the rule adopted by these decisions, the reason for the holdings therein is based largely upon the fact that in neither of these sections is there any reference to court proceedings, actions, or suits. But this is not necessary if the specifications made in the statute would make a suit unavailing.

Section 607 specifies the kind and nature of cases in which what is denominated an overpayment may arise by reason of the collection of taxes after the expiration of the period of the statute of limitations although such taxes were originally due and owing by the taxpayer. Section 611 makes an exception to the rule laid down in section 607 and in effect provides, with reference to cases included in this exception, that no "overpayment" shall arise. Necessarily it follows that if demand is made upon the collector for the refund or return of taxes paid after the running of the statute of limitations but which come under this exception, the collector is obliged to say that he is forbidden by law to repay them. It will be observed in this connection that the decisions cited by plaintiff assert that these sections are merely directions to the commissioner, collector, or other officials of the Government and nothing more, and therefore notwithstanding their provisions suit may be brought and maintained to recover the tax. The doctrine laid down by these decisions as to cases which come under the exceptions of section 611 would create a situation that is very peculiar to say the least. If, for example, a demand is made upon a collector for repayment he must say that he is forbidden by law to

make it, but if suit is begun against him for the same thing for which demand was made, it can be maintained and judgment can be entered against him. That Congress intended anything so inconsistent and useless we think no one will contend. When the language of the two sections is considered we think it will be seen there is nothing in them which requires such a construction. True, as before stated, there is nothing said with reference to courts or court proceedings, but court proceedings are not the basis upon which actions are maintained in actions like the one at bar. That depends upon the rights of the plaintiff and its rights are fixed by these sections. If the plaintiff's case came within the provisions of section 611, it had no right to repayment. This makes it necessary for us to consider as to whether its case is in fact included within the provisions of this section.

It is also contended by plaintiff that section 611 applies only to cases of voluntary payment and also to cases where "the collection of any part thereof (of the claim) was stayed," and that the collection of the taxes involved in the instant case was not in fact stayed.

As to the first contention, we think the language of the statute shows clearly that it is not well founded. The section relates to cases where a plea in abatement was filed which in itself would show that the tax was paid unwillingly. This contention also is contrary to the meaning given to the section by the report of the committee which presented the act to Congress, which will be hereinafter set out in connection with the second objection.

The second objection presents a more difficult question and for its proper consideration it will be necessary to [fol. 38] examine that part of the report of the Ways and Means Committee on the revenue act of 1928 which explains the purpose of section 611 and the conditions which it was intended to meet. It is as follows:

"Prior to the enactment of the revenue act of 1924, it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. It was sup-

posed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which the period for assessment expired prior to the enactment of the 1924 act, that the period for collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run. Exceptionally large amounts are involved. Accordingly, it is of utmost importance to provide that the payments already made should not be refunded. In order to prevent inequality, it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new act.

"Your committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, and *merely withdraws the defense of the statute of limitations.* If it is determined that the amount paid is in excess of the proper tax liability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other overpayment." (Report No. 2, 70th Congress, 1st session, p. 34.) (Italics ours.)

A reading of this excerpt from the report leaves no possibility of doubt about the intent and purpose which Congress undertook to embody in section 611. As before stated, the statute only applies to cases where the taxpayer had paid, after the running of the statute of limitations, taxes which had been rightfully due and owing to the Government. There is no equity in a claim for the refund of such taxes in any event, but the statute restricts the Government in retaining them to those cases only where as a favor to the taxpayer the Government had permitted the filing of a plea in abatement and collection was stayed; or in other words, to those cases where the taxpayer by filing a plea in abatement had succeeded in delaying the case over the period of limitations and then sought to take advantage of the favor that had been granted him.

The argument made by the plaintiff is that during the period under consideration there was no provision for a plea in abatement in the law and especially that there was nothing in the plea of abatement that would, under the law, in any event operate as a stay upon the collection of the tax. This may be admitted, but if the statute applies only to taxes the collection of which was stayed by the plea in abatement it becomes a practical nullity, for it could only apply [fol. 39] to a small number of cases arising under the act of 1924, which provided for the filing of a plea in abatement and bond to stay proceedings, if indeed it had any application at all. The language of section 611 and the statement made in the report, we think, forbid any such construction. The section is not limited to cases where the collection is stayed by the filing of a plea in abatement, but simply to cases where the collection "was stayed," and we think the words "was stayed" were purposely used instead of "is stayed." Congress intended the act to apply to the conditions set out in the report showing that in numerous cases taxpayers had filed claims in abatement and delayed the collection until the claim in abatement could be acted upon. In this case the collector, in March, 1924, demanded payment of the tax in controversy and the plaintiff filed a plea in abatement, whereupon nothing more was done until February, 1925, when the commissioner passed on the claim in abatement and allowed it in part, of which the plaintiff was notified, and in March of the same year plaintiff filed an appeal from the deficiency fixed by the last determination to the United States Board of Tax Appeals. No further action was taken by the collector until June, 1925. It thus appears that plaintiff was granted a stay upon filing the plea in abatement. The word "stay" as used in ordinary conversation means to hold from proceeding, to postpone, or to keep back. In law, it generally means to suspend by judicial proceedings. We think it was not used in the statute in its strict legal meaning but in its ordinary sense and when we give it that meaning it is quite clear that the collection was stayed by the collector or commissioner, and there can be no doubt but that in so holding we are following the intention of Congress as expressed in the report to that body which explained the meaning and purpose of sec-

tion 611. To put the construction on the statute contended for by plaintiff requires us to attribute to Congress the absurdity of declaring that unless a stay was brought into effect by an act which did not and could not produce a stay, the statute would not operate and thus the statute would nullify itself. It needs no citations to show that it is our duty to so construe the statute as to give it some force and effect, when this can be done consistently with its language. The construction given, in our opinion, not only accords with the language used, but is the only construction that could properly be given.

These conclusions are supported in part, if not entirely, by the opinion rendered in the case of Clyde G. Huntley, Collector, v. H. S. Gile and W. T. Jenks by the United States Circuit Court of Appeals for the ninth circuit, 32 Fed. (2d) 857, reversing Gile and Jenks v. Huntley, 29 Fed. (2d) 209, cited by counsel for plaintiff; and also the case of Regla Coal Company v. Bowers, decided by the District Court, Southern District of New York, November 13, 1929, C. C. H. D— 9415, p. 8888. The decision in the case last cited contains an elaborate discussion of the proper construction of sections 607 and 611 and the Constitutional question raised in connection therewith. On all of these matters the same conclusion is reached as is set forth in this opinion. In the Huntley case, supra, attention is called to the fact that if it be held that the statutory provisions have no application to taxes collected after the period of limitations [fol. 40] has expired, the statute is useless and meaningless. There would of course be no occasion or use whatever for the statute in cases where the tax was collected prior to the expiration of the period of limitations. The only reason for enacting the statute in question was the fact, as shown by the report of the committee, that "amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run." It is quite evident that the intention of the lawmakers was that the statute should apply to taxes collected after the statute of limitations had run.

Objection has been made that the construction contended for by defendant is retroactive and that a statute ought not to be construed as having retroactive application unless it appears that Congress had such intent. The provisions of the statute under consideration are retroactive in form and

if anything further is needed to show the intent of the legislative body enacting it, it will be found in that portion of the report accompanying the act of 1928 which has already been set out in this opinion. The report makes it clear that the sole purpose of the provision was to obviate the effect of the decision in the case of Bowers v. New York & Albany Lighterage Co., supra, and to apply to cases arising under prior acts.

One other point remains to be decided. It is further contended that if the statute is construed in accordance with our holding, it is unconstitutional and invalid for the reason that it would deprive plaintiff of a vested right. If plaintiff acquired such a right, it was by virtue of the statute of limitations. In Huntley v. Gile and Jenks, (C. C. A. 9th Dist.) supra, it is said, "no vested right accrues to the taxpayer out of the running of the period of limitation for the collection of a valid tax," citing Rafferty v. Smith, Bell & Co., 257 U. S. 226; United States v. Heinszen & Co., 206 U. S. 370; Collector v. Hubbard, 12 Wall. 1; Haight v. United States, 22 Fed. (2d) 367; Campbell v. Holt, 115 U. S. 620; Railroad Co. v. Alabama, 101 U. S. 832; Beers v. Arkansas, 20 How. 527; West Side Co. v. Pittsburgh Co., 219 U. S. 92; Brushaber v. U. P. R. R. Co., 240 U. S. 1; Lynch v. Hornby, 247 U. S. 339, 343.

These authorities would seem to dispose of the point last considered, but before concluding attention is especially directed to another rule which, in our opinion, effectually precludes this court from considering plaintiff's claim.

Nothing is better settled than the principle that the legislative branch of the Government has complete right and authority to determine when, how, and where the Government shall be sued and whether it can be sued at all. If Congress sees fit to provide that a suit can not be maintained for taxes paid, it is clear (at least where the taxes were rightfully imposed) that they can not be recovered. "Where a statute creates a right and provides a special remedy, that remedy is exclusive." United States v. Babcock, 250 U. S. 328, 331. The constructions which we have heretofore put on sections 607 and 611 of the revenue act of 1928, specify in what cases suits may be maintained to recover taxes paid which in their origin were valid and due from the taxpayer. If we are correct in this, then by clear implication only such suits as are permitted by these two

sections can be maintained on the ground that the tax had been paid after the running of the statute of limitations, and [fol. 41] that such was the intention of Congress we think admits of no doubt. As we find that plaintiff's claim does not belong to a class for which suit may be brought, this Court has no authority or jurisdiction to approve it, regardless of whether the rights of the plaintiff had vested or not.

It follows that the petition of the plaintiff must be dismissed and it is so ordered.

Williams, Judge, and Littleton, Judge, did not hear and took no part in the decision of this case.

Graham, Judge, and Booth, Chief Justice, concur.

[fol. 42] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 2nd day of December, A. D., 1929, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law, which amount is found to be $32.14.

By the Court.

VI. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On January 24, 1930, the plaintiff filed a motion for a new trial.

On February 17, 1930, the following opinion of Green, J., and concurring opinion by Littleton, J., on the plaintiff's motion for a new trial, were filed:

[fol. 43] VII. Opinion of the Court by Green, J., on the Plaintiff's Motion for New Trial and Concurring Opinion by Littleton, J.—Filed February 17, 1930

Supplemental Opinion on Motion for New Trial

Green, Judge, delivered the opinion of the court:

On the submission of this case it was contended by counsel for plaintiff that the tax in this case having been determined under the so-called relief provisions of sections 327 and 328 of the act of 1918, the matter of the amount of the tax was governed by the discretion of the commissioner in applying these provisions, and that having once determined the amount, he could not by a second and later determination increase the amount which he had originally fixed for the tax, and as the matter was within the discretion of the commissioner his original determination was final and conclusive both upon him and this court. It is now urged by brief in argument on the motion for a new trial that this point receive further consideration, and as there are other cases on the docket involving the same question, it has been thought best to file this opinion supplemental to the one heretofore rendered.

At the outset, to avoid confusion of thought, it should be kept in mind that the question under consideration is not whether the commissioner's action under the sections of the law above referred to is reviewable by this court. That question was settled by the Williamsport Wire Rope Co. case, 277 U. S. 551, wherein it was held that this court had no jurisdiction to review his decision in such cases. The question in the case at bar is whether the commissioner had authority to redetermine, change, or modify his original determination or reassess an additional amount against the plaintiff. Counsel for plaintiff, however, taking the Williamsport Wire Rope Co. case, supra, as the basis for his argument, contends that the action of the commissioner was final and for that reason could not be changed even by himself when once it was made. It would seem a rather surprising doctrine that if the commissioner discovered the next day or the next month that he had made a gross error that he had no authority to correct it, but for reasons

hereinafter stated we shall not discuss this point. Plaintiff's counsel cites a number of cases which he claims hold that when a tribunal or an official is authorized to act with [fol. 44] discretionary power, when that authority has once been exercised, no further authority exists; and that where lawful authority is delegated to an administrative officer, his acts in an administrative way are not subject to change or review. For the purposes of the argument, it may be conceded that where the acts of the officer are administrative in their nature a different principle prevails with reference to the review thereof than when he acts in a quasi-judicial capacity. Nevertheless, it is uniformly held that the decisions of such tribunal or officer may be set aside on the ground of fraud or mistake, and it has also been held that an administrative officer whose decision is conclusive upon the courts may review and change his original decision, provided that no rights have become vested such as would arise from the issuance of a patent, a certificate, or something of that nature. Love v. Flahive, 205 U. S. 195, 199. Plaintiff also contends that in such event the burden of proof is upon the party seeking to have the decision changed to establish the fraud or mistake, and that even then it can only be done by a court and not by the officer or tribunal itself. The cases cited to support this rule would seem to show that it only applies when the Government is seeking to set aside the act of one of its own officials. In Austin Co. v. Commissioner of Internal Revenue, 8 B. T. A. 628, affirmed 35 Fed. (2d) 916, this particular question was involved in a case of the same nature as the one before us. With reference to the additional assessment made by the commissioner, the court said:

"There as a presumption that he performed his duty." (Citing United States v. Chemical Foundation, 272 U. S. 1.)

And with reference to the claim that the commissioner lacked authority to make any further assessment, the court also said:

"Even though there was lack of authority to make such assessment upon a changed view of the same facts, there was not lack of authority to make it where there was fraud or mistake of law or fact in the original assessment.

In this situation the burden was on the petitioner to show that the commissioner's action grew out of circumstances which did not warrant it."

But it would require too much time and space to review the decisions recited on behalf of plaintiff, and we do not think it necessary to analyze them for the reason that in our opinion they have no application whatever to the case at bar, and we can rest our decision firmly on other grounds. Our reasons for this holding are set out below.

A full consideration of the question now under consideration requires that we should go somewhat into the history of the income and profits tax system in force at the time when the tax in question was assessed. The first experience of this country with an income tax was at the time of the Civil War and for a short period thereafter. During that period the rates of the tax compared to those now in force were very low and the administrative provisions of the law were few and simple. The recovery of an amount overpaid could only be obtained in the same manner as an overpayment of any other tax, that is, when the payment had been made under protest and suit brought to recover the amount overpaid. This income tax law was repealed and finally adjudged unconstitutional. In 1913, the Constitution having been amended, another income tax law was placed upon our statute books. Here [fol. 45] again, the rates were comparatively speaking, quite low, the administrative provisions few and simple, in no case was the act of the commissioner discretionary, and no changes were made in the method of obtaining refunds in proper cases. After this country became involved in the World War it became necessary to greatly increase the rates of income and profits taxes, which was done first by the act of 1916 and then by the act of 1918, under which the taxes in question in this case were levied. It became evident—in fact, was a matter of common knowledge—that the application of these high rates through a tax with which neither the Government officials nor the citizenship of the country were familiar gave rise to numerous errors, inequalities, and hardships, both in favor and against the taxpayers, which called for action by Congress. The result was that an entirely new body of laws was

built up under which, while the administrative proceedings were in part governed by authorized Treasury regulations, for the most part they were ordered and directed by statutes in a manner which compared to the methods theretofore existing may be said to be exceedingly specific. These statutory provisions applied to the income and profits taxes. To what extent they applied to other taxes it is not necessary for us to herein determine. The special object and purpose thereof was to make clear and plain, so far as possible, the procedure in admintering the income and profits taxes, and they are to be found in connection with the revenue acts which imposed them. These acts made great changes in the proceedings for the assessment and collection of taxes and also for the refund of taxes erroneously or wrongfully collected. For the first time they provided for limitations upon the assessment and collection of taxes, for the refund of taxes although no protest had been made when they were paid, and eventualy gave the right to have the question of the taxpayer's liability judicially determined without having first paid the tax. So also while Congress was thus making the path of the taxpayer easier and more definite, it prescribed limitations on his right to object to assessments and claim refunds. It was also important that the Government as well as the taxpayer should be protected from errors and mistakes that might enter into the assessment and collection of taxes.

The ultimate question in the case is not whether the decision of the commissioner was final, but when it became final; and that, as we shall see, was only when the statute of limitations had run against the Government. With the evident purpose of making it clear when the decision of the commissioner became final, Congress, in the act of 1921, included a comprehensive and sweeping provision applying to all cases under the income and profits taxes with reference to the time when a case was finally settled, showing definitely when assessments made by the commissioner became final, so that no further action could be taken. As the assessment which plaintiff claims was final was not made until 1922, this provision unquestionably applied thereto. It is found in a separate title of the act, headed in manner and form as set out below:

"Title XIII.—General Administrative Provisions"

This major division was also subdivided, and in one of these subdivisions we find section 1312 of the same act which, in our opinion, clearly controls the judgment in this [fol. 46] and similar cases. This section with its subhead is set out below in exactly the form that it appears in the act as passed by Congress:

"Final Determinations and Assessments

"Sec. 1312. That if after a determination and assessment in any case the taxpayer has without protest paid in whole any tax or penalty, or accepted any abatement, credit, or refund based on such determination and assessment, and an agreement is made in writing between the taxpayer and the commissioner, with the approval of the Secretary, that such determination and assessment shall be final and conclusive, then (except upon a showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment thus made) (1) the case shall not be reopened or the determination and assessment modified by any officer, employee, or agent of the United States, and (2) no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States."

This section (1312) appeared for the first time in the 1921 act but was repeated verbatim et literatim under the same title and subhead in the revenue acts of 1924 and 1926 except that the words "without protest" are omitted. We think this statute so plain that "he who runs can read." A taxpayer had only to look at these headings to find under the head of "final determinations and assessments" whether the assessment which had been made against him was final. In Holmquist v. Blair, 35 Fed. (2) 10, the court said with reference to this provision:

"Section 1312 provides that, where the commissioner has determined and assessed the tax and without protest it has been fully paid or a refund accepted and a written

agreement entered into by the commissioner and the taxpayer (approved by the Secretary), 'such determination and assessment shall be final and conclusive' except for fraud, malfeasance, or misstatement of material fact. Sections 1309 and 1312 leave no doubt of the authorized power in the commissioner to make reexaminations, redeterminations, and reassessments. From the above sections of the act it is clear that Congress authorized reexaminations by the commissioner, and that the only limits thereon are that such must be made within four years (section 250 (d)) and must be after written notice to the taxpayer after investigation of the necessity for such reexaminations. Section 1312 points out the way and the only way in which an assessment may be made final before expiration of the four-year period. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' Botany Mills v. United States, 278 U. S. 282, 289."

Section 1309 referred to reexaminations.

In the same decision, Woodworth v. Kales, 26 Fed. (2d) 178, is reviewed and doubt is expressed as to whether, under the particular facts in the case, a contrary doctrine is held therein, but the court in its opinion says with reference to the case last cited that it prefers the rule laid down in Loewy & Son, Inc., v. Commissioner, 31 Fed. (2d) 652, in which the same construction is placed upon section 1312 of the revenue act of 1921.

[fol. 47] We do not overlook that in Holmquist v. Blair, supra, and Loewy & Son v. Commissioner, supra, the assessment was not made under an administrative provision, but the line of argument used in the decisions is equally applicable to the case at bar. It should be noted also that in the Austin Co. case, supra, the assessments were made under a provisions of the act of 1917 similar to the so-called relief provisions of the act of 1918 under which the assessments were made in the case at bar, and the act of the commissioner was therefore administrative, but the right of the commissioner to make a second assessment was upheld.

If it be claimed that prior to the passage of this provision of the law the first determination of the tax by the

commissioner under the relief provisions was final, this affords no reason for such cases not being included within the purview of the section under discussion if Congress intended to exempt them from its provisions, but rather furnishes a conclusive argument that Congress did not so intend. Assuming for the purpose of the argument that prior to the passage of section 1312 such acts have been final, it makes it the more evident that if Congress had intended that this rule should continue, it would have so stated in this section which was three times enacted, and which we might say assumed by everyone to be all inclusive in its provisions. All the works on income taxation so treat it, and this has been the practice followed by the department, which has repeatedly reviewed its decisions upon special assessments under the relief act, upon the request of taxpayers.

It is said that when the commissioner determined the tax under the relief provisions of the act of 1918, and not only found that the plaintiff had been overassessed but sent the plaintiff a check for the amount of the overassessment, which plaintiff accepted, the whole matter was then settled. But section 1312 provides for exactly this kind of a case, and that such a settlement is not final unless an agreement is made in writing between the taxpayer and the commissioner as provided therein.

It should also be noted that in section 273 of the revenue acts of 1924 and 1926 Congress provided that the commissioner might reverse his action in the case of an abatement, refund, or credit and reassess and collect the amount. It expressly recognizes that in arriving at the correct tax to be collected there may have been additional assessments or collections, abatements, refunds, and credits and clearly indicates that a refund, erroneous or otherwise, does not bar action by the commissioner within the satutory period provided by law. An amount erroneously refunded becomes none the less a tax because of that fact.

Since the submission of the case at bar, we have been favored with further argument on this same question in the case of Taft Woolen Co. v. United States, No. J-61. In the brief on the case last cited, attention is called to provisions of section 204 (b) and 234 (a) (8) of the rev-

enue act of 1918 which, it is said, were reenacted in the revenue act of 1921, and that there would be no necessity for these provisions, which are general in their nature, being enacted if the commissioner had power otherwise to redetermine the tax in all cases. There might possibly be some force in this argument if the particular provisions of these two sections had been reenacted in their entirety. [fol. 48] Such is not the case. The part of these provisions which had general application, namely, the words "the taxes imposed by this title and by Title III," was omitted and other changes made when the sections to which reference is made were reenacted in the act of 1921, doubtless for the reason that Congress was making express provision elsewhere with reference thereto in section 1312 of the same act which we have set out above. As changed in the act of 1921, these provisions apply only to particular cases and state that in such cases the commissioner not only may reexamine the return, as he could in all other cases, but that he "*shall*" do so in certain instances. (Italics ours.) Also, in the argument in the Taft Woolen Co. case, supra, reference is made to sections 222 (a) and 222 (b) of the act of 1918 which it is said were reenacted in the act of 1921. An examination thereof will show that these provisions applied to amounts claimed by credits by the taxpayer by reason of taxes paid in foreign countries, or to refunds received therefrom and to nothing else. It was clearly necessary that a special provision should be made with reference thereto in a separate paragraph. It is also said that a Treasury regulation prevented the reopening of a case under circumstances such as existed in the case at bar, but a casual examination of the Treasury regulation with reference to the reopening of cases makes it plain that it applied only to cases where the taxpayer was making application to have the case reopened.

For the reasons above stated we hold that the commissioner was not precluded from making a reassessment within the period prescribed by the statute of limitations, which in this case had not expired. It follows that the motion for a new trial must be overruled and it is so ordered.

Williams, Judge, and Booth, Chief Justice, concur.

Concurring Opinion

Littleton, Judge, concurring:

On the theory that the court has jurisdiction to go into the question of the authority of the commissioner to reconsider a determination made by him under sections 327 and 328 and change his first determination and reassess and collect a portion of the profits tax theretofore determined under these sections, and refunded, I agree with the foregoing opinion and the conclusion reached therein, but I think the claim of the plaintiff should be denied on the ground that the court is without jurisdiction to pass upon the question of the authority of the commissioner in this case.

This case relates entirely to a matter arising under the special-assessment provisions of the statute which confer discretionary power in the commissioner to determine the facts and the rate of profits tax through a comparison of the plaintiff with other corporations specified in section 328. It apears that the plaintiff made a return for the year 1918 and paid a total income and profits tax of $91,944.37. This return showed a total net income of $124,488.61, the normal tax upon which was $4,156.30 and the excess-profits tax, as computed under section 301 of the revenue act of 1918, was $87,836.07. Thereafter plaintiff made application to the commissioner for computation of its profits tax under section 328 of the said act, known as the special-assessment provision, claiming that the profits tax of $87,836.07 paid was too high and worked upon the plaintiff an exceptional hardship as compared with other corporations similarly circumstanced. The commissioner, [fol. 49] in his discretion, concluded that this application should be granted, whereupon he made a computation under the special-assessment sections and on June 21, 1922, increased the net income of the plaintiff to $126,219.28, but concluded that the excess-profits tax, when determined under section 328, should be $87,736.39 instead of $87,836.07. As a result, $96,487.97 of the profits tax paid on the return was refunded. In March, 1924, the commissioner reconsidered his action taken under the special-assessment provisions and made another determination

of the amount of plaintiff's profits tax under these provisions by comparison with other corporations and concluded that he had made a mistake; that the correct comparison and computation showed a profits tax of $73,368.23 and that, as a result, he had refunded $13,756.02 too much. No change was made in the net income. He recomputed and reassessed this amount and upon receiving notice thereof the plaintiff filed an abatement claim and a brief. Upon further consideration the commissioner made a further comparison under the special-assessment provisions and upon a further recomputation allowed the abatement claim for $6,354.76 and rejected it for $7,410.26. In August, 1925, the collector made demand for the payment of the last-mentioned amount, and in September, 1925, the plaintiff paid it, together with interest in the amount of $592.82. In this suit plaintiff asks judgment for the amount upon the ground that the commissioner's action on June 21, 1922, under the special-assessment provisions refunding a portion of the excess-profits tax shown upon the return, was final and that he was without authority to reassess and collect any portion of the amount so refunded.

To go into the question whether the commissioner had authority to change his determination and reassess a portion of the tax refunded under the special-assessment provisions would be the same as inquiring into the correctness of such determination. The amount which the commissioner finally determined the plaintiff owed was less than the tax imposed by section 301. The entire matter was embraced within the provisions of section 328. Plaintiff claims that the amount refunded lost its character as a tax and could be recovered only by a suit in which it would be incumbent upon the Government to prove that a refund was erroneous. In such a situation the court would not have jurisdiction to go into the matter. Williamsport Wire Rope Co. v. United States, 277 U. S. 551. And, however egregious the mistake in the first determination might have been, no portion of the amount erroneously repaid could be recovered by the Government.

Graham, Judge, concurs.

[fol. 50] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 35,011. Court of Claims. Term No. 880. Oak Worsted Mills, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed May 7, 1930. File No. 35,011.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 2, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted, the briefs and argument to be limited to the question of the validity and effect of Sec. 611, Revenue Act of 1928, and the case is advanced to be heard immediately following No. 761, Percival E. Magee vs. The United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U. S.
FILED
MAY 21 1930
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 104

OAK WORSTED MILLS, PETITIONER,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

THEODORE B. BENSON,
Counsel for Petitioner.

Of Counsel
GUIL. BARBER,
WILLIAM MEYERSOHN.

(35,011)

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929

No. 880.

OAK WORSTED MILLS, PETITIONER,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

I.

Opinion of the Court Below.

The opinion of the Court of Claims has been officially reported in 36 F. (2d) 529, and will be found printed at R. 32–44. Petitioner filed a motion for new trial and a supplemental opinion was rendered which has been officially reported in 38 F. (2d) 699, and will be found printed at R. 45–54.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3(a) of the Act of February 13, 1925 (43 Stat. 936).

The final judgment of the Court of Claims was entered on February 17, 1930 (R. 44). Application for writ was presented May 7, 1930.

The suit brought in the Court of Claims is for the recovery of corporation income and profits taxes erroneously and illegally assessed and collected, jurisdiction of which is conferred upon the Court of Claims by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

III.

The Facts.

The facts of the case are printed in the petition (R. 1–2) and to avoid repetition counsel begs leave to refer to those pages which contain the shortest and plainest statement that he has been able to make.

IV.

The Statutes Involved.

The statutes involved in this case are printed in the petition (R. 2–4) and to avoid repetition counsel begs leave to refer thereto.

V.

Specification of Errors to be Urged.

The errors which the petitioner urges as grounds for the granting of the writ of certiorari and for the review and reversal of the decision of the Court of Claims are:

1. The court below erred in holding that the Commissioner of Internal Revenue once having exercised a discretion and judgment invested exclusively in him by an Act of Congress and having determined and refunded an overassessment of tax, had authority to thereafter review the same facts and reach a different conclusion.

2. The court below erred in holding that the determination of the tax by the Commissioner of Internal Revenue under the provisions of Sections 327 and 328 of the Revenue Act of 1918 was merely prima facie and not conclusive.

3. The court below erred in failing to hold that once having computed the profits tax on the basis of comparatives selected in the exercise of the discretion conferred on him by the provisions of Section 328 of the Revenue Act of 1918 and having issued a certificate of overassessment and made the refund of the overpayment, the judgment of the Commissioner of

Internal Revenue was final and conclusive and was thereafter not subject to review.

4. The court below erred in failing to hold that under the provisions of the Revenue Act of 1921 the Commissioner of Internal Revenue was precluded from making the reassessment, as an additional assessment to correct an alleged excessive overassessment previously determined, where the entire amount of the tax imposed by statute had once been assessed and paid.

5. The court below erred in failing to hold that the Commissioner of Internal Revenue in assuming to decide that his previous determination of the profits tax under Section 328 was erroneous and in recollecting an amount theretofore paid usurped the functions of the judiciary in violation of Article III, Section I, of the Constitution and took the petitioner's property without just compensation in violation of the Fifth Amendment.

6. The court below erred in holding that Section 611 of the Revenue Act of 1928 is applicable to this case.

7. The court below erred in holding that Section 611 deprived the Court of Claims of jurisdiction in this case.

8. The court below erred in failing to hold that the petitioner's remedy under Section 3226 of the Revised Statutes was not affected by Section 611 of the Revenue Act of 1928.

9. The court below erred in failing to hold that the application of Section 611 to this case would render that section unconstitutional.

10. The court below erred in failing to hold that on the expiration of the five-year period of limitation in Section 250 (d) of the Revenue Act of 1921 the petitioner's liability for taxes, if any, expired.

VI.

The Argument.

Summary of Argument.

A. The determination by the Commissioner of Internal Revenue of the profits tax under Sections 327 and 328 of the Revenue Act of 1918 is final and conclusive and can not be redetermined.

B. The Commissioner of Internal Revenue was without statutory authority to make the reassessment to correct an alleged erroneous overassessment previously determined.

C. The provisions of Section 611 of the Revenue Act of 1928 do not apply to this case for the following reasons:

1. The jurisdiction of the court below is conferred by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes and not by Section 607 of the Revenue Act of 1928 and the case does not come within the provisions of Section 607 nor within the exceptions thereto in Section 611 of the same Act.

2. The provisions of Section 611 are not to be construed to be retroactive to apply to this case.

3. In this case no internal revenue tax was legally assessed within the meaning of the provisions of Section 611.

4. The amount in controversy is not an internal revenue tax within the meaning of Section 611, because the entire tax imposed by statute had already been assessed and paid.

5. In this case no claim in abatement within the meaning of Section 611 was filed. The claim was not in abatement but in bar of the right of the Commissioner to make the re-collection.

6. The collection of no part of a tax was ever stayed by a claim in abatement or otherwise.

7. The amount in controversy was paid under protest.

8. The petitioner and the Commissioner did not enter into a statutory consent in writing for a later determination, assessment or collection of any tax beyond the statutory period as provided in Section 250 (d) of the Revenue Act of 1921.

D. The application of Section 611 of the Revenue Act of 1928 to this case would render it unconstitutional for the following reasons:

1. The power conferred on Congress by the Sixteenth amendment is limited to the laying and collecting of taxes on incomes.

2. The petitioner would be deprived of its property without due process of law and without just compensation in violation of the Fifth Amendment.

The Argument.

A. *The determination of the profits tax by the Commissioner of Internal Revenue under the provisions of sections 327 and 328 of the Revenue Act of 1918 is final and conclusive and can not be redetermined.*

A principle of law that this Court has uniformly upheld is that, where an administrative officer vested by an Act of Congress with exclusive jurisdiction of a matter involving administrative discretion and judgment has once reached a conclusion which has been communicated agreeable to the requirements of law, his decision is final and is not subject to reexamination.

This principle has been recognized in the following cases: *Ex parte Randolph*, 2 Brock (U. S.) 447; *United States* v. *Bank of Metropolis*, 15 Pet. 377, 40 U. S. 240; *West* v. *Standard Oil Company*, 278 U. S. 200, 49 S. Ct. 138. This principle was stated by Mr. Justice Baldwin in *United States* v. *Arredondo*, 6 Pet. 691, 729–730, as follows:

"* * * It is a universal principle, that, where power or jurisdiction is delegated to any public officer or

tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally, for anything done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise * * * are, power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive * * * legislative * * * judicial * * * or special * * * unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law. * * *"

The question here involved is whether this principle applies to the Commissioner of Internal Revenue in the exercise of that discretion, which this Court in *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 48 S. Ct. 587, held was conferred upon him exclusively by Sections 327 and 328 of the Revenue Act of 1918 to select comparatives for the computation of the profits tax and from the exercise of which discretion it was held no appeal was provided.

In this case the Commissioner determined that the petitioner came within the provisions of Section 327 and that it was entitled to have the profits tax computed under the provisions of Section 328.

After having determined that the petitioner was so entitled the Commissioner in June, 1922, computed the profits tax on the basis of certain comparatives selected by him and actually made a refund on the basis of such comparatives. Subsequently and during March, 1924, and without reversing his previous position as to the fact that petitioner's case fell within the scope of Section 327 of the Revenue Act of 1918, and that the tax should be computed under the provisions of Section 328 of said Act, the Commissioner undertook to reinvoke the discretion which he had already exercised and proceeded to recompute the profits tax by *choosing* from his files and substituting different comparatives showing a greater average rate of excess profits tax which resulted in the increase

of petitioner's taxes. In this case there is no fact controversy.

The question that the petitioner seeks to have this Court pass on is the right of the Commissioner of Internal Revenue to reexercise the discretion vested exclusively in him to select comparatives for the computation of the profits tax. Under the decision in the *Williamsport Wire Rope Co., supra*, this discretion is held to be vested solely in the Commissioner and his determination thereunder is not subject to question in a case like this where no appeal can be taken to the Board of Tax Appeals.

The petitioner submits that the decision of the court below, that the exercise of discretion by the Commissioner is not final, is erroneous and should be reversed. The question involved is of public importance for the reason that there are a number of other cases pending which involve the same question and for the further reason that if the decision of the court below is not reversed it will mean the Commissioner can reopen any case in which the statute of limitations has not run. The question here involved is one of importance and calling for the exercise of this Court of its supervisory powers over the Court of Claims.

B. *The Commissioner of Internal Revenue was without statutory authority to make the reassessment to correct an alleged erroneous overassessment previously determined.*

The powers possessed by the Commissioner of Internal Revenue are such only as are conferred on him by Congress. At the time he assumed to make the reassessment here in question the Revenue Act of 1921 was in force and is controlling, *Russell* v. *United States*, 278 U. S. 181, 49 S. Ct. 121. The authority of the Commissioner to assess and collect taxes under such Act is that conferred by Section 250, subparagraph (b) of which defines a deficiency and authorizes the Commissioner to assess a deficiency or to refund an overpayment and subparagraph (d) provides the manner in which the Commissioner may make the assessment of a tax or a deficiency and provides

for its collection. Subparagraph (b) defines a deficiency as the excess of the amount "which should have been paid" over "the amount already paid." Subparagraph (d) authorizes the Commissioner to make an assessment where "a tax or a deficiency in tax is discovered." Under the statute the authority of the Commissioner to make an assessment is limited to the discovery of a tax or a deficiency. In the present case the full amount of the greatest possible tax was assessed at the time of the filing of the return and was paid during the year 1919. There was, therefore, no tax or deficiency in tax which had not already been discovered, assessed and paid. There was no tax or deficiency "which should have been paid." In a similar case, *Kelley* v. *United States*, 30 F. (2d) 193, the Circuit Court of Appeals for the Ninth Circuit stated:

> "There was some discussion on the argument as to the meaning of a deficiency as defined in the revenue laws, but the entire tax imposed by the government was paid, and, if there was no tax, there could in the nature of things be no deficiency."

The petitioner concedes that the Commissioner has authority to make an assessment of an additional tax, for such constitutes a deficiency within the meaning of Section 250 (b). In this case, however, there was no additional tax or deficiency in tax, but the Commissioner attempted to make an additional assessment to correct an alleged erroneous overassessment previously determined. The law provides for the assessment of an additional tax not previously assessed, but not for the additional assessment of a tax previously assessed and paid. Therefore, the petitioner submits that the Commissioner exceeded the authority conferred on him by statute.

This Court in the *Russell* case, *supra*, held that an assessment made prior to June 2, 1924, was controlled by the provisions of the Revenue Act of 1921 and not by the provisions of the Revenue Act of 1924. The court below failed to follow the decision in that case and took the position that the definition of a deficiency to be applied is that found in Section 273 of

the Revenue Acts of 1924 and 1926. In the course of its supplemental opinion, the court below stated:

> "It should also be noted that in section 273 of the revenue acts of 1924 and 1926 Congress provided that the commissioner might reverse his action in the case of an abatement, refund, or credit and reassess and collect the amount. It expressly recognises that in arriving at the correct tax to be collected there may have been additional assessments or collections, abatements, refunds, and credits and clearly indicates that a refund, erroneous or otherwise, does not bar action by the commissioner within the statutory period provided by law. An amount erroneously refunded becomes none the less a tax because of that fact."

The holding of the court below that the definition of a deficiency to be applied to this case is that found in Section 273 of the Revenue Acts of 1924 and 1926 is clearly contrary to the decision of this Court in the *Russell* case, *supra*, and to the clearly expressed provisions of Section 280 of the Revenue Act of 1924 and Section 283 of the Revenue Act of 1926.

In addition to holding that the provisions of Section 273 of the Revenue Acts of 1924 and 1926 applied to this case the court relied on the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Austin Co.* v. *Commissioner*, 35 F. (2d) 910, certiorari denied March 17, 1930, in which case there was a deficiency in tax, as defined by the Revenue Act of 1924 and the case came within the jurisdiction of the Board of Tax Appeals under the provisions of the Revenue Act of 1926. In the present case there was no deficiency. The provisions of the Revenue Acts of 1924 and 1926 do not apply. The Board of Tax Appeals dismissed the petitioner's appeal.

The Act of 1921, which is applicable to this case, provides for the assessment and collection of a tax and for the refund of an overpayment, but petitioner submits that when a tax has once been paid there can be no further liability for taxes and a refund does not restore the tax and that a refund is not subject to recall as a tax. If recoverable at all it is recoverable as a sum illegally paid out of the Treasury and by resorting

to the courts. In *United States* v. *Bank of Metropolis*, 15 Pet. 377, *supra*, the Court at page 401 stated:

> "But if a credit has been given, or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given, * * *"

The Circuit Court of Appeals for the Ninth Circuit in *Kelley* v. *United States*, *supra*, stated:

> "* * * When once paid, a tax is gone, and a refund of the money does not restore it. 'If the owner or any other person entitled to make payment of the tax shall do so, the lien will not only be discharged absolutely, but all authority to proceed further against the property will be at an end.' Cooley on Taxation, 3rd Ed., p. 810. From this view, we know of no dissent."

In *Talcott* v. *United States*, 23 F. (2d) 897, certiorari denied 277 U. S. 604, 48 S. Ct. 601, the Circuit Court of Appeals for the Ninth Circuit held that an amount refunded could be recovered not as a tax but as a sum erroneously paid out of the Treasury and in passing on the counter-claim filed in the case the court stated: "the counter-claim is not a proceeding for the collection of taxes. It is a demand for the repayment to the government of moneys which had been illegally and by mistake paid by an officer of the United States."

If the principle applied in the *Kelley* and *Talcott* cases, that a tax once refunded is not recoverable as a tax but by suit by the United States, is correct, then the court below erred in this case. The United States prevailed in the *Talcott* case and succeeded in recovering, after the statute of limitations for assessment and collection had expired, an estate tax illegally refunded under the decision of this Court in *United States* v. *Robbins*, 269 U. S. 315, 46 S. Ct. 148.

There is a direct conflict between the decision in this case and the decisions in the *Kelley* and *Talcott* cases and the writ should be granted for that reason.

Illegal refunds or refunds made by the Commissioner of Internal Revenue acting without the scope of his authority could, under acts prior to 1928, be recovered by the Government in a counterclaim or other appropriate suit in court, but where a refund was made by the Commissioner acting within the scope of his authority and later alleged to have been erroneous, there was no remedy provided by statute. The 1928 Revenue Act, however, has remedied this situation, by the enactment of Section 610 of said Act, which reads, in part, as follows:

> "(b) Any portion of an internal-revenue tax * * * which has been erroneously refunded * * * may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later."

It is submitted that had the Commissioner the authority, assumed in the instant case, to reassess at will or that there was any provision in the law for the recovery of an alleged erroneous overassessment, there would have been no occasion for the enactment of the provisions of Section 610.

C. *The Provisions of Section 611 of the Revenue Act of 1928 do Not Apply*

AND

D. *Section 611 if Construed to Apply Would be Unconstitutional.*

The decision of the court below with reference to the provisions of Section 611 of the Revenue Act of 1928 conflicts directly with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *United States* v. *Burden, Smith & Co.*, 33 F. (2d) 229.

This Court on March 3, 1930, granted a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit on the petition of *Graham & Foster, Co-partners, etc.* v. *Goodcell, Collector*, No. 589, October, 1929, Term, to review the decision of that court with reference to the application and constitutionality of Section 611 of the Revenue Act of 1928. The application and constitutionality of Section 611 are also

presented in the petition in this case and counsel submits that the same reasons exist for the allowance of the writ as were presented to the court in the petition of Graham & Foster, Co-partners, etc. The application for the writ in the *Graham & Foster* case was not opposed by the Attorney General.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for and demanding the exercise by this Court of its supervisory powers in order that there may be a final determination of the authority of the Commissioner of Internal Revenue, after he has once fully exercised the discretion invested exclusively in him to compute the profits tax under Sections 327 and 328 of the Revenue Act of 1918, to thereafter review his previous computation and reach a different conclusion; that there may be a final determination of the authority of the Commissioner of Internal Revenue under the Revenue Act of 1921 after a tax has been assessed, paid and refunded to reassess and collect the amount thereof from the taxpayer as a tax; and that there may be a final determination of the construction and constitutionality of the provisions of Sections 607 and 611 of the Revenue Act of 1928 and that to such ends the writ of certiorari should be granted and this Court should review the decision of the Court of Claims and finally reverse it.

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